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In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES W. FERRO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
ELLIOTT SCHULDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 556 F.2d 630.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on February 8, 1977. A petition for rehearing with a suggestion for rehearing *en banc*

was denied on June 29, 1977 (Apps. C and D, *infra*). On July 21, 1977, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including August 28, 1977 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state authorities, directing the production for trial on federal criminal charges of a state prisoner against whom a federal detainer has previously been lodged, constitutes a "written request for temporary custody" making applicable the terms and conditions of Article IV of the Interstate Agreement on Detainers Act.

2. Whether respondent, by failing to raise the issue in the district court, waived the claim that his indictment should have been dismissed for violation of the Interstate Agreement on Detainers Act.

STATUTES INVOLVED

1. Section 2 of the Interstate Agreement on Detainers Act, 84 Stat. 1397-1402, 18 U.S.C. App., pp. 4475-4477, provides in pertinent part:

Article II

As used in this agreement:

(a) "State" shall mean a State of the United States; the United States of America * * *

* * * * *

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint * * *.

* * * * *

(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

* * * * *

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance

with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

* * * * *

(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

* * * * *

Article V

(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. * * *

* * * * *

2. 28 U.S.C. 2241 provides in pertinent part:

* * * * *

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

(5) It is necessary to bring him into court to testify or for trial.

* * * * *

STATEMENT

1. In September 1973, respondent and co-defendant James Cyphers were charged in an indictment (73 CR 848) filed in the United States District Court for the Eastern District of New York with mail fraud, in violation of 18 U.S.C. 1341 and 2. The charges resulted from participation by respondent and Cyphers in a fraudulent scheme to obtain airline tickets by using lost or altered credit cards; the tickets were thereafter sold to customers at a discount through the mails (App. A, *infra*, pp. 2a-8a).

When the indictment was returned, respondent was serving a prison sentence in Ohio on an unrelated state offense (*id.* at 8a). Pursuant to a writ of *habeas corpus ad prosequendum* issued by the United States District Court for the Eastern District of New York, respondent was brought from Ohio for arraignment before the district court on October 12, 1973,

and entered a plea of not guilty (J. App. A, pp. 1-2).[1] Subsequently, federal authorities returned respondent to state custody and lodged a federal detainer against him with Ohio authorities (App. A, *infra*, p. 9a).

On February 5, 1974, respondent was again produced before the district court by means of a writ of *habeas corpus ad prosequendum* (J. App. A, p. 2). While he was in federal custody, the original indictment had been dismissed in favor of a superseding indictment (74 CR 322) (*id.* at 3-4), to which respondent also pleaded not guilty (*id.* at 4). Respondent was thereafter again returned to Ohio (App. A, *infra*, p. 9a), where he remained until his return to federal custody for trial in January 1976 (*ibid.*).

Following a jury trial, respondent was convicted of two counts of mail fraud charged in the superseding indictment, as well as a third mail fraud count charged in another indictment (75 CR 259) filed after his return to Ohio. He was fined a total of $3,000 and sentenced to concurrent terms of four years' imprisonment on the first and third counts, and to a five-year probationary term on the second count, to run consecutively to the concurrent prison terms.[2]

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[1] "J. App." refers to the Joint Appendix to Appellants' Briefs in the court of appeals.

[2] Co-defendant Cyphers was similarly convicted and was sentenced to concurrent terms of five years' imprisonment, with a consecutive five-year probationary term, and a total of $3,000 in fines.

2. On appeal to the Second Circuit, respondent argued for the first time that the indictment on which he had been tried and convicted should have been dismissed with prejudice because he had been returned from federal to state custody without having first been tried on the federal charges, in alleged violation of Article IV(e) of the Interstate Agreement on Detainers Act ("Agreement").[3] Article IV of the Agreement provides that the prosecuting authority of a member state that has criminal charges pending against a defendant serving a prison sentence in another member jurisdiction may lodge a detainer with the prison authority of that jurisdiction and, upon presentation of a "written request for temporary custody," obtain temporary custody of the prisoner for purposes of trial. The Agreement further provides that a prisoner so procured must be tried (a) within 120 days of his arrival in the receiving state (subject to continuances granted "for good cause shown in open court") and (b) prior to being returned to the sending state, or else the charges against him shall be dismissed with prejudice. Articles IV(c), IV(e), and V(c).[4]

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[3] The United States joined the Agreement by Act of December 9, 1970, Sections 1-8, 84 Stat. 1397-1403, 18 U.S.C. App., pp. 4474-4478. At all times relevant hereto, Ohio was also a party to the Agreement. Ohio Rev. Code §§ 2963.30-2963.35 (1975 Repl.).

[4] Article III of the Agreement provides an alternative means by which transfer of the prisoner may be accomplished. Under Article III(c), prison officials are required to notify each prisoner of any criminal charge on the basis

A divided panel of the court of appeals reversed respondent's conviction and dismissed the superseding indictment (74 CR 322) with prejudice.[5] Relying on its earlier decision in *United States* v. *Mauro*, 544 F.2d 588 (C.A. 2), petition for a writ of certiorari pending, No. 76-1596, the court held that federal authorities had violated Article IV(e) of the Agreement in 1974 by obtaining respondent by means of a writ of *habeas corpus ad prosequendum* and then returning him to Ohio authorities without trial on the federal charges (App. A, *infra*, pp. 9a-11a).[6] In addi-

of which a detainer has been lodged against him by another jurisdiction, and, further, to inform the prisoner of his right to request trial on the charges underlying the detainer. The prisoner may then act to clear such a detainer by filing a request with the appropriate authorities in the prosecuting jurisdiction for final disposition of the charge against him. He must thereupon be brought to trial (a) within 180 days of delivery of this request and (b) without being returned to the sending state after his transfer to the prosecuting state, or else the charges are subject to dismissal with prejudice. Articles III(a), III(d), and V(c).

[5] Because the third indictment (75 CR 259), involving a separate transaction, was filed on April 1, 1975, after respondent had been returned to Ohio, the court concluded that dismissal of that indictment was not required. The court also remanded the case to the district court for further consideration (with regard to respondent on the remaining indictment and with regard to Cyphers on all counts) of an alleged violation of the local speedy trial rules (App. A, *infra*, pp. 11a-15a).

[6] Respondent did not challenge, and the court did not discuss, his return in 1973 prior to the time that a detainer had been lodged. For the reasons stated in our petition in *United States* v. *Mauro*, *supra*, we do not believe that this transfer violated Article IV(e) of the Agreement.

tion, the majority rejected the government's argument that respondent had waived any claim under the Agreement by failing to move for dismissal on that basis in the district court. The court concluded that, because the government had not shown that respondent was aware of the detainer before trial, he should be allowed to invoke the Agreement for the first time on appeal (App. A, *infra*, pp. 9a-11a).

Judge Timbers, dissenting, expressed the view that, under Rule 12 of the Federal Rules of Criminal Procedure, respondent had waived his claim under Article IV(e) by his failure to raise it prior to or at trial (App. A, *infra*, pp. 16a-19a).

REASONS FOR GRANTING THE WRIT

The questions presented in this case are the same as the questions presented in *United States* v. *Ford*, 550 F.2d 732 (C.A. 2), petition for a writ of certiorari pending, No. 77-52.[7] In *Ford* the United States

[7] The questions presented are also related to the question presented in *United States* v. *Mauro*, *supra*. In *Mauro* we are seeking review of a decision of the Second Circuit that a federal writ *ad prosequendum*, directing that federal authorities be given custody of a state prisoner, itself constitutes a "detainer" within the meaning of Article IV of the Agreement. Other circuits have held, contrary to the Second Circuit, that a federal writ *ad prosequendum* is not a detainer and constitutes an alternative method, separate and apart from the Agreement, for securing the presence of state prisoners for trial on federal charges. See *United States* v. *Scallion*, 548 F.2d 1168 (C.A. 5), petition for a writ of certiorari pending, No. 76-6559; *United States* v. *Kenaan*, C.A. 1, No. 77-1014, decided July 7, 1977, petition

has sought review of a decision of the Second Circuit holding that Article IV of the Agreement governs the transfer of a state prisoner by a federal writ of *habeas corpus ad prosequendum* after a "detainer" had been filed against him with state prison authorities. We have also presented the additional question whether the defendant waived his claim under the Agreement by failing to raise it in the district court.

For the reasons stated in our petition in *Ford*, we believe that Article IV(e) of the Agreement is inapplicable to transfers of state prisoners by writs of *habeas corpus ad prosequendum* and that, in any event, a defendant waives his rights under the Agreement by failing to raise the issue in the district court.[a] Should this Court grant the petition in *Ford* and reverse the decision of the court of appeals on either ground, it should also reverse the court of appeals' decision in this case. We recommend, therefore, that this Court hold the present petition pending its disposition of *United States* v. *Ford*, *supra*.

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for a writ of certiorari pending, No. 77-206; *Ridgeway* v. *United States*, C.A. 6, No. 76-2145, decided July 13, 1977, petition for a writ of certiorari pending, No. 77-5252.

We are sending respondent copies of our petitions in *Ford* and *Mauro*.

[a] Although this case involves a waiver of rights under Article IV(e) of the Agreement, whereas *Ford* involves a waiver of rights under Article IV(c) (the speedy trial provision), we do not believe that distinction to be of legal significance.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of this Court's disposition of *United States* v. *Ford*, *supra*.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
ELLIOTT SCHULDER,
Attorneys.

AUGUST 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 328, 329—September Term, 1976

(Argued October 18, 1976 Decided February 8, 1977)

Docket Nos. 76-1131, 76-1160

UNITED STATES OF AMERICA, APPELLEE

v.

JAMES SEELEY CYPHERS and JAMES W. FERRO,
APPELLANTS

Before:

SMITH, OAKES and TIMBERS,
Circuit Judges

SMITH, *Circuit Judge:*

This is an appeal by James Cyphers and James Ferro from judgments of conviction on three counts, based on two indictments, of violating 18 U.S.C. § 1341 (mail fraud) after a jury trial in the United States District Court for the Eastern District of New York, Thomas C. Platt, Jr., *Judge*. Both Cyphers and Ferro claim that the evidence was not sufficient

to establish any violation of § 1341 and that they were denied their right to a speedy trial. Cyphers also claims that Judge Platt erred in admitting certain evidence and in denying his request that he be allowed to make the argument to the jury. Ferro also claims that his trial violates the Interstate Agreement on Detainers. We reverse on two counts as to Ferro's claim involving the Interstate Agreement on Detainers. We find some possible merit in the speedy trial claim on all counts and therefore remand for further consideration. We find no merit in the other claims.

I.

Cyphers and Ferro were found guilty by a jury on three counts of using the mail to defraud airline companies by means of altered credit cards and identifications, in violation of 18 U.S.C. § 1341.[1] The essence

[1] 18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

of the government's case was that Cyphers and Ferro had a scheme for fraudulently obtaining airline tickets by using lost or altered credit cards and that they mailed airline tickets so obtained to Dr. I. Simon on or about February 3, 1973 and on or about February 26, 1973 and to Dr. Stuart Sylvan on or about February 19, 1973.

Relying on *United States* v. *Maze*, 414 U.S. 395 (1974), Cyphers and Ferro claim that the evidence was insufficient to establish any violation of § 1341. In *Maze* the only mailings were of credit invoices by motel employees, and the Supreme Court held that Maze's use of one Meredith's credit card to obtain goods and services at motels did not constitute a violation of § 1341, since Maze "probably would have preferred to have the [credit] invoices misplaced by the various motel personnel and never mailed at all." *Id.*, at 402. Cyphers and Ferro claim there was no violation of § 1341 because in each case they had purchased the ticket and received payment from either Dr. Simon or Dr. Sylvan prior to mailing the ticket, and so "the mailing here bore no relation to appellants' acquisition of the fruits of their fraud" (Brief of Appellant Ferro at 20); "any fraudulent scheme would have been no less successfully consummated had the airline tickets never been delivered" (Brief for Appellant Cyphers at 25). Cyphers and Ferro

also claim that there was no evidence showing that either the tickets received by Dr. Simon on February 3 or the tickets received by Dr. Sylvan were fraudulently purchased by appellants.

In *United States* v. *Finkelstein*, 526 F.2d 517, 526-27 (2d Cir. 1975), *cert. denied*, —— U.S. —— (1976), we set out the elements involved in a violation of § 1341: "sufficient evidence in the record to permit a jury to infer beyond a reasonable doubt that a scheme or artifice to defraud existed, that the participants in the scheme caused the mails to be used in furtherance of that scheme, and that the defendant was a participant in the fraudulent scheme. . . . [I]rrelevant is the fact that he [the defendant] did not personally mail the count letter or directly involve himself in the transaction. . . . It is enough that he participated in the scheme and that it was foreseeable that the scheme would involve use of the mails."

Construing the evidence in the light most favorable to the government, *United States* v. *Barash*, 412 F.2d 26, 31 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969), we hold that the evidence was sufficient to show that both Cyphers and Ferro committed three violations of § 1341.

Dr. Simon, a dentist, testified that he frequently traveled to Florida from Long Island and was told by George Nagin, a friend, that airline tickets for Florida could be obtained at a discount. Dr. Simon called Nagin and had him order round-trip tickets for a February 8, 1973 flight from John F. Kennedy Airport ("JFK") to West Palm Beach. After he paid

Nagin, Dr. Simon received the tickets in the mail on or about February 3, 1973. This transaction was the basis of Count I of indictment 74 CR 322. Again in February, 1973 Dr. Simon needed tickets to Florida; since Nagin was in Florida, Dr. Simon went to Nagin's Manhattan office to pick up the tickets ordered through Nagin's business associate. At Nagin's office Dr. Simon met a man who gave him the tickets he had ordered; at the same time Dr. Simon ordered tickets for his partner, Dr. Sylvan. Dr. Sylvan testified that he received these tickets in the mail on or about February 14, 1973; this transaction was the basis of Count II of indictment 74 CR 322. At the end of February, 1973 Dr. Simon again purchased airline tickets through Nagin for a flight between JFK and Florida, and he received these tickets through the mail. This transaction was the basis of Count I of indictment 75 CR 259.

George Nagin testified that he had been told by Cyphers about the availability of cheap airline tickets and that he had purchased tickets from Cyphers, at a discount, for his own use. Nagin also testified that either Cyphers or Ferro, Cyphers' nephew, picked up the money when Dr. Simon had ordered tickets. Cyphers had given Nagin a telephone number, 832-1211, in order that he could be reached for orders, and Nagin had given this number to Dr. Simon. This telephone number was proven to have been installed, together with an answering device, in Cyphers' apartment.

On March 19, 1973 an arrest warrant for Cyphers and Ferro was issued pursuant to a complaint of a Postal Inspector, and the warrant was executed against Cyphers and Ferro at Cyphers' apartment on March 20, 1973. Consent to search the apartment was obtained from Cyphers, and various drivers' licenses, credit cards, a credit card validator, and various credit card company bulletins reporting stolen credit cards were found in Cyphers' briefcase and in his apartment.

One of the seized credit cards bore the name of Richard Redstrom. Richard Rooney, manager of commercial credit for United Airlines, testified that a credit card bearing the account number found on the Redstrom credit card was issued by United Airlines to Richard Hedstrom and that the credit card had been altered to read Richard Redstrom. Richard Hedstrom testified he lost his credit card on February 23, 1973. Rooney testified that numerous airline tickets had been purchased on February 26, 1973 at Boston on the Hedstrom/Redstrom credit card and that the airline had received no payment for these tickets. The signatures on the Hedstrom/Redstrom charge slips were identified as Ferro's. The airline tickets purchased on February 26 included the one received by Dr. Simon at the end of February and others for flights leaving from Newark, Chicago, Cleveland, and Los Angeles.

It was stipulated that a Fred Preston Staff credit card had been reported lost and that three airline ticket charge slips were incurred with the use of the

credit card after its reported loss. There was evidence from which the jury could believe that Cyphers had signed these airline tickets charge slips. One of these charge slips involved an air line ticket purchased in Newark for a flight scheduled to depart from Los Angeles.

While there is no direct evidence that either Cyphers or Ferro purchased either the tickets received by Dr. Simon on February 3 or the tickets received by Dr. Sylvan, the jury could find from the evidence summarized above and other evidence (including two other lost credit cards that were found in Cyphers' briefcase on March 20 and had been altered and used by Ferro to purchase airline tickets that were not paid for)[2] that Cyphers and Ferro had a scheme that included the fraudulent purchase of Dr. Simon's February 3 tickets and Dr. Sylvan's tickets.

While Cyphers and Ferro might have delivered the tickets to Dr. Simon and Dr. Sylvan in person, they were mailed and the jury could find that these mailings were part of the general scheme to mail airline tickets to people in New York, Chicago, Cleveland, and Los Angeles. The jury could also find that the

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[2] This evidence was properly admitted during the government's case in chief, since it was not introduced solely to show the defendants' criminal character and its probative worth on the existence of the fraudulent scheme outweighed its potential prejudice. *United States* v. *Grady*, —— F.2d ——, ——, slip op. 291, 302 (2d Cir., Oct. 27, 1976); *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975).

fraudulent scheme depended on repeat business from satisfied customers of Cyphers and Ferro and that the delivery of the tickets was an essential part of the scheme. Under the standards set out in *Finkelstein* the evidence was sufficient to support the conviction of both Cyphers and Ferro on all three counts.

II.

Cyphers was represented by an attorney during the trial. Relying on *Faretta* v. *California*, 422 U.S. 806 (1975), and *Herring* v. *New York*, 422 U.S. 853 (1975), Cyphers claims he has a sixth amendment right to make his own summation.

This reliance is misplaced. *Herring* does say that "a defendant who has exercised the right to conduct his own defense has, of course, the same right to make a closing argument." 422 U.S. 864, n. 18. But neither *Faretta* nor *Herring* deals with a defendant who is represented by counsel and wishes to participate as co-counsel. In *United States* v. *Wolfish*, 525 F.2d 457, 462-63 (2d Cir. 1975) (per curiam), *cert. denied*, 423 U.S. 1059 (1976), which was decided after *Faretta* and *Herring*, we held that a defendant who is represented by counsel has no sixth amendment right to participate as co-counsel. We reaffirm that holding.

III.

On July 19, 1973 Ferro, who was on bail, surrendered to Ohio authorities to begin serving his prison term for a previous unrelated offense. On

September 20, 1973 a writ of *habeas corpus ad prosequendum* was served, and on October 12, 1973 he appeared in the United States District Court for the Eastern District of New York and entered a plea of not guilty. He was then returned to the custody of Ohio authorities. On November 12, 1973 the United States lodged a detainer in Ohio against Ferro, and on January 25, 1974 the government served another writ of *habeas corpus ad prosequendum*. In the spring of 1974 Ferro appeared several times in the United States District Court for the Eastern District of New York, and on June 26, 1974 Judge Travia ordered Ferro "to be returned from whence he came." The records of the Bureau of Prisons indicate that he was returned to Ohio State Reformatory, Mansfield, Ohio. He was tried in January, 1976.

Ferro claims that his 1974 transfer to Ohio violates Article IV(e) of the Interstate Agreement on Detainers ("the Agreement"), 18 U.S.C.A. Appendix. Ferro first raised this claim in a supplemental brief filed with this court in October, 1976, and the government argues that his failure to raise this claim prior to trial constitutes a waiver under Rule 12(f) of the Federal Rules of Criminal Procedure.

While the policies underlying Rule 12(f) are helpful guides, they are not determinate in construing a statute. Article III of the Agreement provides that the defendant shall be brought to trial within 180 days after the detainer has been lodged provided that he makes a written request to that effect. Article IV(e), on the other hand, makes no reference to a

request by the prisoner and says "if trial is not had on any indictment . . . prior to the prisoner's being returned to the original place of imprisonment . . . such indictment . . . shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." In other words, if a state in which a prisoner is charged does not take the initiative to bring a prisoner back for trial the prisoner may require it to do so rather than suffer indefinitely the effects of the detainer on his imprisonment in the state of his incarceration. If a state does take the initiative and bring him from the state of imprisonment to the accusing state it must complete the prosecution before returning him. The main purpose of the Act is to provide means for expeditious resolution of all outstanding charges which may affect the conditions or duration of imprisonment and treatment. Article I of the Agreement says that one "purpose of this agreement [is] to encourage the expeditious and orderly disposition of such charges. . . ." Bringing Ferro from Ohio to New York in January, 1974, returning him to Ohio in the summer of 1974, and then again bringing him to New York for trial in New York in January, 1976, is not an "orderly disposition" of his federal case and violates Article IV(e).

Article IX of the Agreement says "[t]his agreement shall be liberally construed so as to effectuate its purposes." While the government initially argued on appeal (Supplemental Brief at 3, n.2) that there was nothing in the record indicating that a detainer

had been lodged against Ferro, the record now before us indicates that a detainer was lodged against Ferro. There is no showing that Ferro knew, prior to trial, that the detainer had been lodged against him. In such a situation we hold that Ferro may invoke Article IV(e) for the first time on appeal to this court.

We therefore order indictment 74 CR 322, which was filed on April 23, 1974, dismissed with prejudice as to Ferro. *United States* v. *Mauro*, —— F.2d ——, slip op. 265 (2d Cir., Oct. 26, 1976). Indictment 75 CR 259 involving a separate transaction was filed on April 1, 1975 after Ferro had been returned to Ohio. Prosecution under it did not violate the Agreement and it will not be dismissed.

IV.

Based on a complaint by Postal Inspector Robert McDowall, an arrest warrant was issued for Cyphers and Ferro on March 19, 1973 and they were both arrested on March 20, 1973. On September 18, 1973 a 43-count indictment, 73 CR 848, was filed against Cyphers and Ferro; 40 counts involved the mailing of credit invoices and three counts (counts 20, 21 and 22) involved the mailing of airline tickets to individual purchasers. On September 19, 1973 a notice of readiness was filed. Cyphers entered a plea of not guilty on September 20, 1973, and Ferro entered a plea of not guilty on October 12, 1973.

Following the Supreme Court's decision in *Maze* in January, 1974, appellants moved on February 19, 1974 to dismiss the original indictment. The motion

was granted on April 5, 1974, and on April 23, 1974 a new indictment, 74 CR 322, was filed, charging Cyphers and Ferro with two counts of mailing of airline tickets. Count I of 74 CR 322 was derived from Count 20 of the original indictment. The government filed its new notice of readiness on May 13, 1974.

On April 1, 1975 the government filed another indictment, 75 CR 259, charging Cyphers and Ferro with one count of mailing an airline ticket. The government filed its notice of readiness on this indictment on June 6, 1975.

Trial on indictments 74 CR 322 and 75 CR 259 began on January 5, 1976. Cyphers and Ferro claim that the long delay between their arrest and the government's readiness for trial violates Rule 4 of the Eastern District's Plan for the Prompt Disposition of Criminal Cases "(the Plan"). Ferro also claims that the 33-month delay between his arrest and the trial violates his sixth amendment right to a speedy trial.

In *Barker* v. *Wingo*, 407 U.S. 514 (1972), the Supreme Court set forth some of the factors the Court should consider in deciding whether a defendant's sixth amendment right to a speedy trial has been violated: "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530.

In *Barker* the delay was over five years; here it was less than three years. Part of the delay is attributable to the illness of a key government witness (Dr. Sylvan), the change in legal theory necessitated

by the Supreme Court's decision in *Maze*, and a shift in defense counsel. On April 9, 1975 Ferro moved to dismiss the indictments on the ground that his sixth amendment right was violated. Ferro does not claim that the delay prejudiced his defense. He claims (Brief for Appellant Ferro at 31-32) that he was prejudiced because his incarceration in New York during the spring of 1974 prevented a timely consideration of his parole by Ohio authorities and interfered with the rehabilitative possibilities of being incarcerated in Ohio; he also claims he was prejudiced by not being able to receive a federal sentence partly concurrent with his Ohio sentence. These types of prejudices, to the extent they are included in the holding of *Barker*, are less serious than the prejudice of an impaired defense. *Barker* v. *Wingo*, 407 U.S. at 532. Engaging "in a difficult and sensitive balancing process," *Barker*, 407 U.S. 533, we hold that Ferro's sixth amendment right to a speedy trial was not violated.[3]

Rule 4 of the Plan provides that "in all cases the government must be ready for trial within six months from the date of the arrest . . . or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest."[4] Rule 5 of the Plan

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[3] *But cf. United States* v. *Vispi*, —— F.2d ——, slip op. 513 (2d Cir., Nov. 15, 1976) (20-month delay violates sixth amendment).

[4] The full text of Rule 4 of the Plan is printed at *United States* v. *Flores*, 501 F.2d 1356, 1358 n. 1 (2d Cir. 1974).

gives various provisions for tolling the six-month period.[5]

On December 18, 1974 Judge Platt denied appellants' motion to dismiss indictment 74 CR 322, and on April 18, 1975 he denied their motion to dismiss indictment 75 CR 259. In his first ruling he relied on Postal Inspector McDowall's affidavit that the investigation and preparation of this complex case extended beyond the date on which appellants were arrested, and Judge Platt ruled that Rule 5(c)(ii) of the Plan therefore tolled the six-month period. Judge Platt did not, however, make a finding as to when the government's investigation and preparation of the case was completed. Judge Platt's April 18, 1975 ruling does not fully articulate his reasons for denying appellants' motion.

For purposes of computing the six-month period of Rule 4 of the Plan, the time begins when Ferro and Cyphers were arrested on March 20, 1973. In this case the period initially stops when the government filed its notice of readiness on September 19, 1973.[6] Since Ferro was continuously incarcerated in New York and Cyphers was continuously on bail,

[5] The full text of Rule 5 of the Plan is printed at *Flores*, 501 F.2d 1359 n. 2.

[6] Normally the period would end when the government filed its notice of readiness after the defendants had entered their pleas of not guilty. *United States* v. *Bowman*, 493 F.2d 594, 597 (2d Cir. 1974). But in this case the defendants' pleas were entered within a reasonable time of the government's filing of its notice of readiness and before our decision in *Bowman*.

the six-month period resumes when indictment 73 CR 848 was dismissed on April 5, 1974 and ends (1) on indictment 74 CR 322 when the government filed its notice of readiness on May 13, 1974 and (2) on indictment 75 CR 259 when the government filed its notice of readiness on June 6, 1975. Without taking account of any of the tolling provisions of the Plan, the period under Rule 4 of the Plan is, therefore, 7 months and 7 days for indictment 74 CR 322[7] and 20 months for indictment 75 CR 259.[8] We therefore remand for determination as to whether any of the tolling provisions of the Plan are applicable. *United States* v. *Flores*, 501 F.2d 1356 (2d Cir. 1974) (per curiam).[9]

Reversed and dismissed with prejudice as to indictment 74 CR 322 as to Ferro and remanded for further consideration in light of this opinion.

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[7] March 20, 1973-September 19, 1973: 5 months, 29 days
April 5, 1974-May 13, 1974: 1 month, 8 days
Total time: 7 months, 7 days

[8] March 20, 1973-September 19, 1973: 5 months, 29 days
April 5, 1974-June 6, 1975: 14 months, 1 day
Total time: 20 months

[9] Assuming, *arguendo*, that the district court, after the hearing, dismisses indictment 75 CR 259 with prejudice as to both Cyphers and Ferro and does not dismiss indictment 74 CR 322 as to Cyphers, a new trial would be unnecessary for Cyphers. The evidence concerning the transaction which forms the basis of indictment 75 CR 259 and the evidence dealing with Ferro's participation in the scheme were admissible as to Cyphers on indictment 74 CR 322 (see fn. 2, *supra*).

TIMBERS, *Circuit Judge*, concurring in part and dissenting in part:

I concur in the judgment and opinion of the Court in all respects with the exception of Part III, as to which I respectfully dissent, since I believe that Ferro's failure to raise his claim under Article IV (e) of the Interstate Agreement on Detainers (the Agreement) until his supplemental brief on appeal—never in the district court—constituted a waiver under Fed. R. Crim. P. 12(f).

A claim founded on a violation of Article IV(e) of the Agreement stems from the government's administrative treatment of the defendant after indictment and before trial. As such, it is a defense "based on defects in the institution of the prosecution" within the meaning of Fed. R. Crim. P. 12(b)(1) and "must be raised prior to trial" or it is waived under Fed. R. Crim. P. 12(f). Those defenses "capable of determination without the trial of the general issue" which may be raised at the defendant's option prior to or at trial—the principal examples being double jeopardy, res judicata, statute of limitations and immunity—concern matters as to which only the fact of the prosecution's institution and not the details attending it are relevant. Furthermore, Article I of the Agreement states as its purpose "to encourage the expeditious and orderly disposition of . . . charges . . . ." In light of this, Ferro's Article IV (e) claim fairly may be characterized as a species of speedy trial claim. It is well established that a speedy trial claim must be timely asserted. See, e.g.,

Barker v. *Wingo*, 407 U.S. 514, 531-32 (1972); *United States* v. *Lustman*, 258 F.2d 475 (2 Cir.), *cert. denied*, 358 U.S. 880 (1958).[1]

I disagree with the majority's construction of the Agreement so as to render an Article IV(e) claim not subject to waiver. Such construction is not required by the Agreement or by any decision of the Supreme Court of which I am aware. On the contrary, the orderly administration of criminal justice, in my view, requires that Rule 12 and the Agreement be accommodated. The manifest purpose of Article IV(e) is deterrence. It bespeaks a judgment that only the ultimate sanction of dismissal of the indictment will insure the government's compliance with the Agreement's purpose of securing the expeditious disposition of charges which require the lodging of detainers. Since the government hardly can rely on defendants to fail to raise Article IV(e) claims in pre-trial motions,[2] no material interference

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[1] Even if the pre-trial motion requirement of Rule 12(f) were inapplicable, surely Ferro waived his claim under Article IV(e) for failure to have raised it at trial. See 8 Moore's Federal Practice ¶ 12.03[1] (2 ed. 1976). *United States* v. *Friedland*, 391 F.2d 378 (2 Cir. 1968), *cert. denied*, 404 U.S. 867 (1969).

[2] Fed. R. Crim. P. 12(c) provides that the district court may set the time for making pre-trial motions. The Rule 12(f) waiver provision applies to any Rule 12(b)(1) motion not made at that time. It is not difficult to conceive of a situation in which a return to custody giving rise to an Article IV(e) claim might occur after the disposition of motions under Rule 12. Precisely that situation arose here. Ferro made a motion to dismiss indictment 74 Cr. 322 on May 1974. The motion was denied on June 4. He was not returned to

with the deterrent purpose of Article IV(e) would result from the application of Rule 12(f).

Finally, the majority's holding that Ferro may invoke Article IV(e) for the first time on appeal on the ground that "[t]here is no showing that Ferro knew, prior to trial, that the detainer had been lodged against him", —— F.2d at ——, strikes me as blinking at the hard facts. Whatever may have been the state of Ferro's knowledge of the detainer, he obviously knew of his own transfer to New York at the end of January 1974 and his return to Ohio prior to trial pursuant to Judge Travia's order of June 26, 1974. Under these circumstances, Ferro clearly had knowledge of facts sufficient to put him on notice of the existence of the claim which he waived under Rule 12(f). Cf. *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341, 362-63 (1963); *United States* v. *Reynolds*, 300 F.Supp. 503, 505-06 (D.D.C. 1969).

I therefore dissent from the dismissal of indictment 74 Cr. 322 as to Ferro and would include his two-count conviction under that indictment in the remand for determination as to the applicability of

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Ohio until after June 26. But since the Article IV(e) claim did not come into existence until his return to custody, there was nothing to be waived by his earlier motion to dismiss. The obvious course would be for the district court to entertain a second motion. Nothing in Rule 12 forecloses such a motion, since no Rule 12(f) waiver would have occured. Significantly, Ferro could have included his Article IV(e) claim in the motion to dismiss which he made on November 20, 1974.

the Eastern District Plan for the Prompt Disposition of Criminal Cases. Ferro himself, in his brief before us, suggested such a remand with respect to both indictments.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

76-1131
76-1160

[Filed July 18, 1977, in Clerk's Office,
U.S. District Court E.D. N.Y.]

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of February one thousand nine hundred and seventy-seven.

Present: HON. J. JOSEPH SMITH
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
Circuit Judges,

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES SEELEY CYPHERS AND JAMES W. FERRO,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for

the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court as to appellant James W. Ferro, be and it hereby is reversed in part and dismissed with prejudice as to Indictment 74 Cr 322 and that the actions be and they hereby are remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

76-1131

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of June, one thousand nine hundred and seventy-seven.

Present: HON. J. JOSEPH SMITH,
HON. JAMES L. OAKES,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES SEELEY CYPHERS AND JAMES W. FERRO,
DEFENDANTS-APPELLANTS

A petition for a rehearing having been filed herein by counsel for the appellee, United States of America

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

76-1131

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of June, one thousand nine hundred and seventy-seven.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES SEELEY CYPHERS AND JAMES W. FERRO,
DEFENDANTS-APPELLANTS

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee United States of America, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

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